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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. ~~179~~ 24

WILLIAM P. ROGERS, Secretary of State,
Appellant,

vs.

ALDO MARIO BELLEI,
Appellee.

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF VICENTE GONZALEZ-GOMEZ

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INTEREST OF AMICUS

The interest of *amicus,* Vicente Gonzalez-Gomez, is readily apparent. For the outcome of the instant case may well determine whether he too is an American citizen and whether he shall be allowed to continue living in this country.

Vicente Gonzalez-Gomez was born in Mexico on July 25, 1938. Since his mother was then an American

citizen, he acquired American citizenship at birth pursuant to the provisions of Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797.

In 1964, proceedings were instituted by the Immigration and Naturalization Service to deport him from the United States to Mexico. Although conceding that Gonzales had been an American citizen, the government contended that he had lost his citizenship by failing to comply with the provisions of section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), the same statute which is in issue here. The service found that he had lost his citizenship and thus was in the United States unlawfully. He was ordered deported.

Gonzalez thereupon filed a petition for judicial review in the Court of Appeals for the Ninth Circuit, pursuant to the provisions of section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a. The proceedings were remanded in accordance with section 106(a)(5)(B) to the District Court for the Eastern District of California for a hearing de novo upon Gonzalez' claim to American citizenship.

Following the evidentiary hearing, the District Court found that Gonzalez had not complied with the provisions of section 301(b). It also rejected his claim that section 301(b) was unconstitutional. The District Court's opinion is printed in the appendix to appellant's brief.

ARGUMENT

I

THE ABSENCE OF SPECIFIC LANGUAGE IN THE FOURTEENTH AMENDMENT RELATING TO THE ACQUISITION OF CITIZENSHIP AT BIRTH IN FOREIGN COUNTRIES DOES NOT ALTER THE FUNDAMENTAL HOLDING OF THIS COURT IN AFROYIM v. RUSK THAT EVERY AMERICAN CITIZEN IS PROTECTED AGAINST THE INVOLUNTARY LOSS OF CITIZENSHIP.

The main thrust of the government's argument is that *Afroyim v. Rusk,* 387 U.S. 253, does not shelter from involuntary loss the citizenship of those who derived it through their parents at birth abroad.[1] To reach its conclusion, the government reasons that *Afroyim* found in the Fourteenth Amendment a prohibition against congressional destruction of citizenship; that the Fourteenth Amendment refers only to citizens who "are born or naturalized in the United States"; that appellee was not "born or naturalized in the United States"; hence that *Afroyim* does not invalidate the provisions of section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b).

The government's argument overlooks the following considerations:

A. This Court's holding in *Afroyim* was an extensive and sweeping one. There is no reason to believe it deliberately and consciously chose to leave such a broad class of citizens unprotected against involuntary expatriation.

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[1]Hereinafter referred to as derivative citizens or derivative citizenship.

B. The government's reasoning would drain all meaning from the privileges and immunities clause of the Fourteenth Amendment with respect to derivative citizens.

C. The sources of this Court's opinion in *Afroyim* can be traced beyond the Fourteenth Amendment. There is even less reason, therefore, to adopt the narrow intepretation of the amendment urged by the government.

A. The Broad Sweep of Afroyim v. Rusk

It is difficult to accept the proposition that the absence of any reference in *Afroyim v. Rusk* to derivative citizens indicates this Court was not concerned about the possibility of their involuntary expatriation.

As the District Court below correctly noted, such an interpretation would be "incompatible with the broad and forceful position put forth by the Supreme Court to protect an important constitutional right." *Bellei v. Rusk*, 296 F. Supp. 1248, 1249.

Indeed, it would be difficult to conceive of more forceful or sweeping language than that employed in the *Afroyim* opinion itself.

> "We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race." 387 U.S. at 268. (Emphasis added.)

Does the Court's failure to add the phrase "or in whatever manner citizenship was acquired" really

mean it chose to leave out derivative citizens? It hardly seems likely. The Court, quite plainly, was talking about all citizens.

B. The Privileges and Immunities Clause

Perhaps an even more fundamental flaw in the government's argument is the effect it would have upon application of the privileges and immunities clause of the Fourteenth Amendment.

That clause, of course, provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

The clause does not distinguish among citizens in any way. Presumably, it would protect all citizens, regardless of the manner in which they acquired citizenship.

Yet if the government's position is correct, and if the Fourteenth Amendment was never meant to apply to derivative citizens because of the absence of such language from the citizenship clause, then presumably the states would be free of the restraints of the second clause and could proceed to deny a derivative citizen, even one who had complied with the statutory residence requirements, his right to vote in a national election or any other privilege or immunity granted to him as a citizen of the United States.

Surely that is an impermissible conclusion.

C. The Sources of the Afroyim Decision Can Be Traced Beyond the Fourteenth Amendment. There Is Even Less Reason, Therefore, To Adopt The Narrow Reading Of The Amendment Urged By The Government.

Although this Court's opinion in *Afroyim v. Rusk* concludes with a finding that the Fourteenth Amendment prevents Congress from providing for the involuntary loss of American citizenship, it is evident that the sources of its holding can be traced beyond the Fourteenth Amendment itself.

What the decision holds, we submit, is that the Fourteenth Amendment merely guarantees what was already the case—that the very nature of the citizen's relationship with the state in a free society precludes the involuntary termination of that relationship by the state.

Agreeing with the dissent of Chief Justice Warren in *Perez v. Brownell,* 356 U.S. 44, 64, 65, the Court said:

> "Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than Perez with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted *to guarantee.* Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. *The very nature of our*

> *free government* makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." 387 U.S. at 267, 268. (Emphasis added.)

The Chief Justice in his dissent did not find the prohibition against involuntary expatriation in the Fourteenth Amendment alone. Rather, he looked upon the amendment as "crystalizing" a prohibition that had always existed and which was derived from the very makeup of a free society. 356 U.S. at 65.

The government's point is that the Fourteenth Amendment does not refer to derivative citizens. But if all citizens were protected from involuntary expatriation before the amendment's adoption, there would be still less reason to accept a narrow, limited, and literal reading of the amendment in order to take the precious right of citizenship from a derivative citizen.

II

EVEN ASSUMING THE ABSENCE OF A FOURTEENTH AMENDMENT PROHIBITION, SECTION 301(b) CANNOT MEET THE TEST OF DUE PROCESS AS SET FORTH IN SCHNEIDER v. RUSK.

The decision in *Schneider v. Rusk*, 377 U.S. 163, rests upon a foundation wholly different from that of *Afroyim v. Rusk*, supra.

At the time, a majority of this Court still accepted the view announced in *Perez v. Brownell*, 356 U.S. 44, that Congress could take away citizenship if that was a means reasonably calculated to achieve an end within the power of Congress to achieve.

The constitutional test applied in *Perez* and thus in *Schneider,* was a Fifth Amendment due process test. Interpretation of the Fourteenth Amendment was not an issue.

The statute struck down in *Schneider v. Rusk* was section 352(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1484(1), which provided for the expatriation of naturalized citizens who had resided for three years in the country of their former nationality or place of birth.

To the Court, mere foreign residence did not provide a rational nexus between the withdrawal of citizenship and implementation of congressional power over foreign affairs. But at the heart of its decision was the concept that in order to overcome the Fifth Amendment's prohibition against unjustifiable discrimination, the expatriating act itself must involve conduct inconsistent with allegiance to the United States.

Quoting at length from Justice Stewart's dissent in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 214, in which Justice Stewart pointed out that prior decisions upholding involuntary expatriation all involved conduct "inconsistent with undiluted allegiance" to the United States, the Court found simply that foreign residence has nothing to do with allegiance. Said the Court:

> "Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It

> may indeed be compelled by family, business, or other legitimate reasons." 377 U.S. at 169.

Section 301(b), the statute here in question, also provides for involuntary expatriation by reason of continued foreign residence. It is no different from the statute involved in *Schneider v. Rusk* and should be struck down for the same reasons.

The government would find a distinction between the two on the basis of reasonableness. In *Schneider*, says the government, the Court ruled out an unreasonable discrimination between native born and naturalized citizens. But it did not outlaw "reasonable conditions imposed in situations not governed by the Fourteenth Amendment." (Appellant's brief, p. 11.)

Just why one is an "unreasonable discrimination" and the other is a "reasonable condition," when both statutes would take away citizenship on the basis of foreign residence, is not entirely clear. If the government's point is that derivative citizens are not governed by the Fourteenth Amendment, it should be sufficient to point out that the *Schneider* decision did not rest upon the Fourteenth Amendment.

Once again missing the point, the government later suggests that section 301(b) does not create the kind of "second class citizenship" prohibited by *Schneider*. Rather, it merely assures that a derivative citizen will demonstrate in a reasonable manner his identification with and allegiance to the United States. (Appellant's brief, p. 20.)

But the whole point of *Schneider v. Rusk* is that foreign residence has nothing to do with allegiance!

One may remain abroad for reasons having no connection with a lack of allegiance to the United States.

Nor does it add anything to argue that 301(b) is distinguishable because it merely requires a person to make "one showing" of his attachment to this country and does not place a permanent restriction upon his citizenship. (Appellant's brief, p. 21.)

What the government calls "one showing" is in fact a requirement that the derivative citizens be "physically present" (not merely have a residence) in the United States for a continuous period of five years during a period in his life when he may wish to travel, or to seek an education abroad, or may have any other good and sufficient reason to remain abroad.[2]

That surely is a restriction to which neither the native born nor the naturalized citizen is subject, and creates another form of "second class citizenship."

III

SECTION 301(b) IS AN EXPATRIATION STATUTE

The government's argument that section 301(b) does not really provide for the involuntary expatriation of American citizens anyway also is without merit.

First of all, the language of section 301(b) is clearly to the contrary. It provides explicitly that anyone who derives his citizenship through one

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[2] An aggregate of 12 months absence during the period is not counted. Sec. 16, Act of September 11, 1957, 71 Stat. 644.

citizen parent (Sec. 301(a)(7)), "shall lose" his citizenship if he fails to comply with the requisite conditions. Expatriation, of course, means the loss of citizenship.

Moreover, it is abundantly clear, not only from the language and effect of section 301 and its predecessors that persons affected became citizens at the time of their birth. There is and was no postponement of citizenship until they complied with the particular residence requirements.

Indeed, as the Court below has noted, a derivative citizen is subject to all of the duties and entitled to all of the rights and privileges of citizens before he is old enough even to comply with the so-called retention requirements.

Failure to comply with the provisions of section 301(b), therefore, can mean only one thing by any fair reading of the law—loss of citizenship. The fact is not changed by terming it a "condition subsequent" to the statutory grant of citizenship.

After all, one becomes a naturalized citizen only by statutory grant of Congress. The expatriatory provision struck down in *Schneider v. Rusk*, therefore, could just as well be termed a "condition subsequent" to the grant of naturalization. That is, since Congress has the power to grant naturalization upon its own terms, it could include conditions subsequent to assure continued allegiance.

The plain fact, however, it that the provision struck down in *Schneider*, as everyone agrees, was an expatriation statute. Section 301(b) is no different.

IV

IF SECTION 301(b) IS UNCONSTITUTIONAL, FAILURE TO COMPLY WITH ITS PROVISIONS CANNOT BE CONSIDERED A VOLUNTARY RENUNCIATION OF CITIZENSHIP.

The right of a citizen to give up his citizenship voluntarily is not disputed.

Seizing upon a comment of the District Court in the case of *Vicente Gonzalez-Gomez v. Immigration and Naturalization Service,* E.D. Calif. Civ. No. F-151, the *amicus* herein, the government hastens to suggest that the very failure to comply with section 301(b) indicates a voluntary choice to abandon American citizenship.

The flaw in that kind of logic should be apparent. If a person is given a choice between alternatives, one of which is unconstitutional, how can it be said he has made a voluntary or meaningful choice?

CONCLUSION

We respectfully urge the Court to affirm the judgment of the District Court and to find section 301(b) to be unconstitutional.

Dated, San Francisco, California,
December 24, 1969.

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